Supreme Court, U. S.
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NO. 80-319

IN THE

SUPREME COURT OF THE UNITED STATES

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_____ TERM, 198_____

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TOMAS MENCHACA AND WIFE,
IRMA MENCHACA,

PETITIONERS

VS

CHRYSLER CREDIT CORPORATION,
BLASA BLUME, J. MARTINEZ, CITY
OF LAREDO, NORMAN CLARK AND
BLAZER FINANCIAL SERVICES, INC.

_____

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

JACOB G. HORNBERGER
JACOB G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
512 (722 1121)
ATTORNEYS FOR PETITIONERS

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The petitioners, Tomas Menchaca and wife, Irma Menchaca, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 7, 1980.

QUESTION PRESENTED

The District Court summarily dismissed petitioners' civil rights suit for want of jurisdiction. The question arising is:

Whether the Seventh Amendment to the United States Constitution requires that a jurisdictional issue be submitted to a jury where the jurisdictional issue and the issue on the merits are so intermeshed that the question of jurisdiction is dependent on the merits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES----------///

OPINIONS BELOW---------- 1

JURISDICTION---------- 1

CONSTITUTIONAL, STATUTORY AND
RULES PROVISIONS INVOLVED---- 2

STATEMENT OF FACTS---------- 6

REASONS FOR GRANTING WRIT--------- 8

CONCLUSION---------- 14

CERTIFICATE OF SERVICE---------- 15

APPENDIX A
OPINION----------1-46

APPENDIX B
DENIAL OF PETITION FOR
REHEARING EN BANC----------47-48

APPENDIX C
MEMORANDUM AND ORDER---------49-51
JUDGMENT----------51-52

APPENDIX D
FEDERAL RULES OF CIVIL
PROCEDURE--RULE 12----------53-60

APPENDIX E
PLAINTIFFS' ORIGINAL
COMPLAINT----------61-72

///

TABLE OF AUTHORITIES

Cases

Bell v Hood, 327 US 678,681 (1946)---14

Gilbert v David, 235 US 561 (1915)---14

Jacob v City of New York, 315 US 752, 752-753 (1942)----------11

Land v Dollars, 330 US 731 (1947)----11

Larson v Domestic & Foreign Commerce Corp., 231 US 682, 690 (1949)----------11

Marbury v Madison, 2 L.Ed. 60 (1 Cranch 137) (5US)(1803)------10

Mississippi Pub. Co. v Murphee 326 US 438 (1946)----------10

Sibbach v Wilson & Co., 312 US 1, 9-10 (1940)----------10

Smithers v Smith, 204 US 632, 644-645 (1907)----------12

St. Paul Mercury Indem. Co. v Red Cab Co., 303 US 283 (1938)------14

U. S. v Germaine, 99 US 508,510 (1979)----------10

Constitutions

U. S. Const., amendment vii----------2

Statutes

Federal Rules Civil Procedure Rule 12----------3,4,5

///

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 613 F2d 507. (Appendix, infra A-1-46). There was no formal opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1980. A petition for rehearing en banc, timely filed, was denied on July 9,1980. (Appendix, infra B-47-48) The jurisdiction of this Court is invoked under 28 USCS 1254(1).

CONSTITUTIONAL, STATUTORY,AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The statute by which Congress delegates to the Supreme Court the power to

regulate the practice and procedure of federal courts, 28 USC Sec. 2072, provides in pertinent part as follows:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions...
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution (USCS Const. Amend. 7)."

Rule 12 of the Federal Rules of Civil Procedure, dealing with the manner

of presenting defenses and objections, provides in pertinent part as follows:

"Rule 12. DEFENSES AND OBJECTIONS--WHEN AND HOW PRESENTED--BY PLEADING OR MOTION--MOTION FOR JUDGMENT ON THE PLEADINGS

(a) * * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted...

(c) * * *

(d) Preliminary Hearings. The defenses specifically enumerated in (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * * * **

(h) Waiver or Preservation of Certain Defenses.

(1) * * *

(2) * * *

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

STATEMENT OF FACTS

This is a civil rights suit arising under 42 USC Sec. 1983. Petitioners claim that Chrysler Credit Corporation and police officers of the City of Laredo, Texas acted in concert to take wrongful repossession of petitioners' automobile. In their Original Complaint Petitioners requested a preliminary injunction for the return of the automobile and a jury trial on their claim for damages. (Appendix, infra E- at 71).

At the hearing on the application for a preliminary injunction, petitioners testified that agents of Chrysler Credit Corporation acted in concert with the city police officers to take the automobile. The police officers testified that the police officers played no part in the repossession and were present at

the scene only to prevent a disturbance of the peace. At the conclusion of the hearing, the District Court chose to believe the testimony of the police officers and dismissed the action for want of jurisdiction. (Appendix, infra D -49-51). Petitioners were never given an opportunity to present their legal claim for damages to a jury.

The Court of Appeals affirmed. (Appendix, infra, A- at 22). Judge Garza, dissenting, indicated that the holding of the majority was in direct conflict with the decisions of other circuits and pointed out that "we enter into dangerous territory when we sanction this sort of summary pre-trial disposition involving vigorously disputed factual allegations, particularly where important constitutional rights are involved."

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts squarely with the following decisions:

a. Berardinelli v Castle and Cooke Inc., 587 F2d 37 (9th Cir. 1978).

b. Sunray DX Oil Co. v Federal Power Commission, 351 F2d 395 (10th Cir. 1965)

2. The decision below conflicts substantially with the following decisions:

a. Zunamon v Brown, 418 F2d 883 (8th Cir. 1969)

b. Wade v Rogala, 270 F2d 280 (3rd Cir. 1959)

c. Fireman's Fund Insurance Co. v Railway Express Agency, 253 F2d 780

(6th Cir. 1958).

3. The decision below raises problems as to the constitutional validity of Rule 12 of the Federal Rules of Civil Procedure.

The Court of Appeals held that the denial of trial by jury was proper under Rule 12. (Appendix, infra D-53-60 for Rule 12). The Seventh Amendment guarantees that trial by jury shall be preserved inviolate. The Federal Rules of Civil Procedure are promulgated under the provisions of 28 USC Sec. 2072 which provides that the rules of civil procedure "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

The fact that this Court promulgated Rule 12 does not foreclose consi-

deration of its validity, meaning, or consistency. See Mississippi Pub. Co. v Murphree, 326 US 438 (1946). Although this Court has authority to regulate the practice and procedure of federal courts, the rules of procedure cannot be inconsistent with the statutes or Constitution of the United States. Sibbach v Wilson & Co., 312 US 1, 9-10 (1940). The Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument. United States v Germaine, 99 US 508, 510 (1879). An act of the legislature, repugnant to the Constitution, is void. Marbury v Madison, 2 L. Ed 60 (1 Cranch 137)(5 US) (1803).

4. The decision below conflicts with decisions of this Court securing

the Seventh Amendment right of trial by jury in civil cases.

"The right of trial by jury in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Jacob v City of New York,, 315 US 752, 752-753 (1942).

This Court has recognized that there are cases where "the jurisdiction of the Court to hear the case may depend... upon the decision which it ultimately reaches on the merits." Larson v Domestic & Foreign Commerce Corp., 331 US 682, 690 (1949); Land v Dollar, 330 US 731 (1947). "In exercising the authority to dismiss the action....the judge may proceed upon

motion of the parties or upon his own motion,and, if he chooses,without trial by jury. Such an authority is not unlimited and its limits ought to be ascertained and observed, lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury. For it must not be forgotten that where, in good faith, one has brought into court a cause of action which, as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind." Smithers v Smith, 204 US 632, 644-645 (1907).

"Before deciding that there is no jurisdiction, the district court must

look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States...the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

"Jurisdiction, therefore, is not defeated...by the possibly that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction... The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction

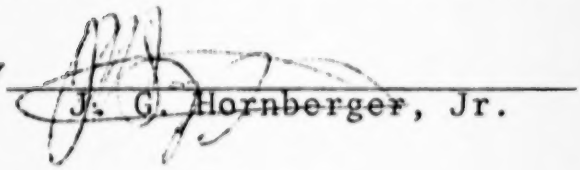
where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Bell v Hood, 327 US 678, 681-683 (1946); St. Paul Mercury Indem. Co. v Red Cab Co., 303 US 283 (1938). But see Gilbert v David, 235 US 561 (1915).

CONCLUSION

The denial of trial by jury in this case will constitute the greatest, if not only, inroad ever made into the Seventh Amendment. This petition for writ of certiorari should be granted.

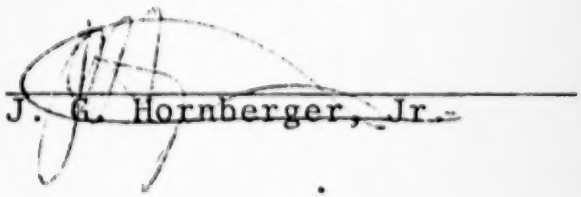
Respectfully submitted,

Jacob G. Hornberger
Jacob G. Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
512 722 1121
Attorneys for Petitioners

by 
J. G. Hornberger, Jr.

CERTIFICATE OF SERVICE

A copy of the above and foregoing Petition for Writ of Certiorari has this 26 day of August, 1980 been mailed to Mr. Horace C. Hall, III, Sames Moore Building, Laredo, Texas 78040; Mr. Charles R. Borchers, 1305 Hendricks, Laredo, Texas 78040 and Mr. Richard Hansen, P. O. Box 820, Laredo, Texas 78040.


J. G. Hornberger, Jr.

TOMAS MENCHACA and wife, IRMA MENCHACA,
PLAINTIFFS-APPELLANTS

VS

CHRYSLER CREDIT CORPORATION, ET AL,
DEFENDANTS-APPELLEES.

NO. 77-3186

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

MARCH 7, 1980

OPINION

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

INGRAHAM, Circuit Judge:

This appeal emerges from a dispute surrounding the presence of the defendant police officers during the course of a repossession of plaintiffs' automobile by agents of defendant Chrysler Credit Corporation. Plaintiffs' civil rights complaint under 42 U.S.C. Sec. 1983 was the

subject of a motion to dismiss for lack of the requisite subject matter jurisdiction. The district court held a hearing and found that the necessary state action element was missing. Accordingly, the motion was granted and the complaint dismissed. Plaintiffs timely appealed to this court seeking reversal of the district court judgment.[1] We affirm.

In December 1974, plaintiffs Tomas and Irma Menchaca purchased a 1975 Chrysler Cordoba automobile which was financed under a retail installment agreement with defendant Chrysler Credit

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1. Although vicarious liability was originally urged by plaintiffs as a point of law germane to the outcome of this appeal, none of the parties dispute the fact that under Monell v Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 56 L.Ed.2d 611 (1978), the City of Laredo

Corporation (Chrysler). The contract included the usual acceleration clause and a provision permitting Chrysler to retake the automobile in the event of default by the plaintiffs.[2] At this time, plaintiffs also purchased two insurance policies that were included in the same installment agreement. One policy covered physical damage to the automobile. There is a dispute as to what the other policy covered; plaintiffs claimed the policy was disability insurance, however, Chrysler contended it was credit life insurance. In any event,

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could not be vicariously liable since there was no governmental custom, plan or scheme to provide official assistance or aid in the repossession of automobiles by private parties pursuant to their private contractual arrangements. Moreover, our disposition of this appeal speaks to the district court's subject matter juris-

the resolution of that dispute between the Menchacas and Chrysler is not in issue to this lawsuit.[3]

Subsequently, in August 1977, plaintiffs became two months delinquent on their obligation to make installment payments. Sometime around August 25, 1977, defendant Norman Clark, an agent for collection, went to plaintiffs' home in Laredo, Texas, to seek payment of the past due amounts. He spoke with Mrs. Menchaca and informed her that the automobile would be repossessed on the following Monday at

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diction. The issue of the vicarious liability of the City of Laredo is only a collateral matter insofar as the complaint was dismissed as to all parties for lack of jurisdiction.

2. Paragraph 2 of the installment contract provided:

noon if both payments were not received by then. It appears from the record that Mrs. Menchaca did not tell Mr. Menchaca about the visit from defendant Clark.

At this time, Mr. Menchaca was unemployed due to a disabling injury he suffered while at work. Mrs. Menchaca was employed at Autophones of Laredo, earning approximately $90 per week. Mr. Menchaca's workmen's compensation benefits were $77 per week and the couple was receiving food stamp assistance. The Menchacas, parents of four children, were unquestionably experiencing financial difficulties in trying to meet the approximately $175 per month note payments.

If Buyer defaults in any payment. . . Seller shall have the right, at its election to declare the unpaid portion of the Total of Payments under this contract to be immediately due and payable, together with any other amount for which Buyer shall

On that following Monday noon, August 29, 1977, two men arrived in a pickup truck equipped with a winch and proceeded to ready the Menchacas' car for towing. It is undisputed that the Menchacas' automobile was parked on the public street at that time. Upon noticing this event, Mr. Menchaca rushed out to try and prevent the repossession. Apparently some rather loud and abusive language was spoken by Mr. Menchaca, which eventually resulted in the defendant police officers being summoned to check out the disturbance.

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have been obligated hereunder. In any such event, Seller, its agents or representatives may enter the premises where the property may be and take immediate possession of the property including any equipment or accessories , and Seller may take possession of any other items in the property at the time of repossession, and hold them without liability until demanded by Buyer.

Meanwhile, Mrs. Menchaca phoned her attorney, who would not be able to arrive until about 2 P.M. She explained this to the men and to the defendant police officers. One of the men showed Officer Blume the repossession papers and told her and the Menchacas that they could not wait two hours until the Menchacas' attorney arrived. The Menchacas were informed by Officer Blume that repossession was a civil matter and that the only reason the police were there was to quiet a reported disturbance. Mr.Menchaca was informed that he could be arrested if he continued

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3. At oral argument counsel for Chrysler informed us that this dispute over the insurance agreement is the subject of another action pending in the Texas state courts.

to use loud and abusive language and create a breach of the peace.

The situation became somewhat less volatile and the officers left. The car was still hooked to the winch; however, the men remained for five minutes or so while Mr. Menchaca removed from the car some possessions, including a CB radio and antenna. Subsequently, the men left with the Menchacas' automobile in tow.

The Menchacas brought this action under 42 U.S.C. Sec. 1983 against all the defendants, alleging a conspiracy to deny them their rights, privileges and immunities under the Fourteenth Amendment to the United States Constitution. They sought damages, injunctive relief requiring return of the car pending the outcome of the suit, attorney's fees and costs. The district court granted the injunction; however, that order was modified to require

merely that defendant Chrysler not dispose of the vehicle until the court granted its approval.

Defendant Chrysler filed a motion to dismiss, challenging the district court's subject matter jurisdiction. The court held a full evidenciary hearing in which both plaintiffs and three of the defendants gave oral testimony under direct and cross examination. At the close of the hearing, the district court found, based on its evaluation of the testimony of all the witnesses, that there was no conspiracy between the officers and the men seeking to repossess the automobile. Moreover, the court could find no other indicia of state involvement,[4] and hence

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4. It was undisputed that the officers had never been involved in an automobile repossession, had never met the Menchacas, and had never met the repossession men.

no state action as jurisdictionally required under 42 U.S.C. Sec. 1983. Accordingly, the motion was granted and the action was dismissed as to all parties.

Plaintiffs have appealed and they argue numerous errors in the district court proceeding. While we are not unmindful of the points that plaintiffs raise, we conclude that the existence of state action was a question central to the district court's own jurisdiction to hear the case. It was thus within the province of the court to decide the merits of that issue, and the district court did not err when it found no state action and dismissed the complaint. We, therefore need not consider the other issues raised.

Moreover, there was no evidence of any history of police department "cooperation" with repossession agents and no evidence

In order for plaintiffs to maintain this claim under 42 U.S.C. Sec. 1983 there are two essential elements which they must show. First, that defendants have deprived them of a right secured by the Constitution and the laws of the United States; second, that this deprivation has occurred while the defendants were acting under color of law.[5] Flagg Bros.,Inc. v Brooks, 436 U.S. 149, 155,98 S. Ct. 1729, 1733, 56 L.Ed2d 185 (1978). Plaintiffs alleged in their complaint that they were deprived of rights, privileges and immunities secured by the Fourteenth

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of any pre-arranged plan between any of the defendants and the police.

5. 42 U.S.C. Sec. 1983 provides:

Every person who,under color of any statute, ordinance, regulation, custom,or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within

Amendment of the United States Constitution when defendants repossessed their car without judicial notice and a hearing. Additionally, plaintiffs alleged that officers Palacios, Blume and,vicariously the City of Laredo, acted in concert with defendant Chrysler to deprive them of those rights without due process of law.

Despite plaintiffs' allegations of multiple bases of jurisdiction in their original complaint, the parties agree that the sole basis of jurisdiction that could support this claim is 42 U.S.C.

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the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Sec. 1983. As such, the existence of the "under color of law" element of the claim, i.e., state action, is required in order to invoke the district court's jurisdiction. We therefore must limit our initial inquiry to that narrow question. Adding another dimension to this inquiry, however, plaintiffs claim that the district court holding that there was no state action denied plaintiffs their Seventh Amendment right to a jury trial. We disagree.

It is axiomatic that a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings. See 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Sec. 3522 (1975). A fortiori a motion to dismiss under Fed. R. Civ. P. 12 (b)(1) for lack of subject matter jurisdiction must include an in-

quiry by the court into its own jurisdiction.

A "facial attack" on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. Mortensen v First Federal Savings & Loan Ass'n., 549 F.2d 884,891 (3d Cir. 1977). A "factual attack," however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered. Id. Moreover, a "factual attack" under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist. Id. at 891-92; McLain v Real Estate Board

of New Orleans, Inc., 583 F.2d 1315, 1318 n. 1 (5th Cir. 1978). See 5 C. Wright & Miller, Federal Practice and Procedure Sec. 1350, at 555 (1969). Accord, Thornhill Publishing Co. v General Telephone & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979).

In the instant case the district court held a hearing on October 5, 1977, on defendant Chrysler's motion to dismiss for lack of subject matter jurisdiction, at which time testimony was heard from both plaintiffs, both defendant police officers and defendant Norman Clark. Some of the facts were disputed. In particular, both officers vehemently denied that either of them ever told either of the plaintiffs that defendant Chrysler's agents had a right to repossess the automobile or that Mr. Menchaca would be arrested if he resisted, and was corroborated by Officer Palacios and the plaintiffs them-

selves, that she told the plaintiffs that repossession was a civil matter which did not concern the police. The defendant police officers' sole reason for being there was to answer a complaint on a disturbance relating to loud and abusive language by Mr. Menchaca.

The plaintiffs testified, albeit inconsistently at times, that they gave up possession of the car because the police had led them to believe they had no choice. Defendants admitted that Mr. Menchaca was informed that he would be arrested for breach of the peace if he continued using loud and abusive language. However, defendants Palacios and Blume both denied that Blume ever told Mr. Menchaca that he had to relinquish possession of the automobile. The police were there merely to calm a disturbance.

At the close of the hearing, the district court issued its memorandum and order dismissing the complaint for lack of jurisdiction, finding no state action. One of plaintiffs' arguments on this appeal is that they were denied their Seventh Amendment right to a jury trial when the court made that finding. In Rosemound Sand & Gravel Co. v Lambert Sand & Gravel Co., 469 F2d 416 (5th Cir. 1972), the court noted: "Rosemound urges that it was denied its Seventh Amendment right to a trial by jury because of the trial judge's decision on the jurisdictional question. The short answer is that there has been no denial of this right because questions of jurisdiction are properly within the ambit of the court's authority." Id. at 418. Sec. 5 C.Wright & A. Miller, supra, Sec. 1350, at 556 58. Plaintiffs' argument is without merit.

While it may be contended that the district court could have awaited "determination of the merits either by the court on a summary judgment motion or by the fact finder at trial," id. at 558, the Court was not bound to do so. Gilbert v David, 235 U.S. 561, 35 S. Ct. 164, 59 L.Ed. 360 (1915). We do not believe the court abused its discretion to decide the merits of the jurisdictional issue, especially since all parties had testified and little else, if anything, remained to be presented to the court for its consideration.

The dissent suggests that since one party (Chrysler) moved for dismissal under Rule 12(b)(1) and another party (Norman Clark) moved for dismissal under Rule 12(b)(6), the district court should not have weighed the evidence necessary to determine the facts supporting its

jurisdiction and that it should have been determined by the factfinder in a trial on the merits. The dissent overlooks the fact that absent some form of concerted conduct on the part of the police officers, there was no jurisdiction to support any other claims against the remaining defendants. Although the allegations of a complaint are taken as true in a challenge to a plaintiff's right to any relief, they may be tested by extraneous evidence when the court's jurisdiction is attacked. If the allegations do not survive the jurisdictional attack, then there is no jurisdiction even to consider the other claims, much less to entertain a Rule 12 (b)(6) motion to dismiss those claims.

We wish to emphasize that this case was not treated by the district court as a summary pretrial disposition as the dissent contends. As noted earlier, plaintiffs' counsel called five witnesses

to testify at the October 5, 1977 hearing, four of whom were present at the original scene , including the plaintiffs themselves. With theexception of the defendant Chrysler's repossession agents, there were no other potential witnesses with firsthand knowledge who could later add anything to what was adduced at that hearing. The trial court heard on both direct and cross-examination every witness offered by the plaintiffs and observed the demeanor, candor and responsiveness of all the witnesses. Numerous exhibits were received into evidence. Plaintiffs had every opportunity to convince the court that the defendant police officers had acted in concert with defendant Chrysler's agents. Plaintiffs were unconvincing[6] and hence the critical element state action was absent, thus depriving the district court of subject matter

jurisdiction to hear any portion of the claim. We agree with the dissent's contention that police intervention and aid in this repossession by defendant Chrysler's agents would constitute state action; however, the testimony failed to show such intervention and aid. We are supported by earlier decisions of this court in Calderon v United Furniture Co., 505 F.2d 950 (5th Cir. 1974), and White v Scrivner Corp., 594 F2d 140 (5th Cir. 1979).

The remainder of plaintiffs' arguments need not be addressed. The district

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6. For example, we note the inconsistency in the plaintiffs' own versions of an alleged threat made by Officer Blume, by way of the following colloquy between Mr. Menchaca and defendant Chrysler's counsel:

Q: Now, this last statement that you made, that the reason that you didn't continue to argue about the car was because Officer Blume had told these other gentlemen that if you gave them any more trouble,

court found that there was no state action and, accordingly, granted defendant Chrysler's motion to dismiss for lack of subject matter jurisdiction. This issue is dispositive of the appeal, and finding no error in the district court holding, the judgment is AFFIRMED.

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just call them and they'd come and pick you up?

A.That's right. That's the exact words.

Q: Your wife didn't testify to that, did she?

A: No sir, she didn't.

Q: Did she hear it?

A: She did.

Q: Then why didn't she testify to it?

A: That's her story. I don't know. I'm saying what I said.

Q: Don't you think this is rather crucial to your case?

A: Well, sir,what she said is her story,and what I said is my story.

Q: And the fact that they are not the same doesn't bother you?

A: It doesn't bother me because it's the truth.

Q: Her story or your story?

A: My story, her story too.

Q. Even though they are different?

A: Whatever, it's still the truth. Supplemental Record at 111-12.

GARZA, Circuit Judge, dissenting:

I respectfully dissent from the opinion of my esteemed brethren. I am unable to agree with either the incomplete recital of the facts in this case, or with the application of precedent concerning standards for consideration of Fed. R. Civ. P. 12(b)(1) and 12(b)(6) motions to dismiss by the district courts. Both the court below and the majority have accepted a version of the facts offered by the Appellees to reach their determination of lack of jurisdiction. I believe that the District Court was prohibited from so weighing the evidence on a motion to dismiss under 12(b)(6) and that under 12 (b)(1), and authorities construing, it should have carried the fact issues relevant to a jurisdictional determination over to trial on the merits. If the allegations of Mr. and Mrs. Menchaca are

true, there clearly is jurisdiction by virtue of 42 U.S.C. Sec. 1983. The trial court not only erred in refusing to defer a determination of those issues, it sustained a substantial injustice which the laws of Texas and the United States were intended to prevent. I cannot be a party to an open license by this court for self-help repossessors to persist beyond the point that Texas law requires them to desist and go to court, and for them to so proceed with the aid of the police. I would reverse, and remand for trial on the merits.

I

A more complete recital of the facts is necessary. The Menchacas claim to have paid a premium of $232.00 for disability protection when they purchased their car, and assert that Chrysler mistakenly did not so credit their payment.

In any event, Mr. Menchaca suffered a work-related injury on November 11, 1976, and became unable to work. He and his wife were forced to rely on the small payments he received under the Worker's Compensation law and on her modest salary to support themselves their four children. Despite Chrysler's refusal to recognize any disability protection, Mr. and Mrs. Menchaca were able to meet their payments through the following June. In July and August they simply could not, and defaulted. They had put $1150 down, and had paid approximately $6,000.00 total to Chrysler.

In summarizing the events of August 29, 1977, the majority wholly adopts the defendant's version, as did the District Court. It ignored the undisputed fact that it was the two repossessors who summoned the policemen after Mr. Menchaca appeared to thwart their

attempts at taking his car. That fact is central. The following facts,offered by the Menchacas, were disregarded by the District Court and the majority. Mrs. Menchaca testified that when she begged the repossessors to wait until her attorney arrived, Officer Blume stated: "Well, if he cannot wait that long, they just have to take the car and you can talk this over later with your lawyer--take this up later with your lawyer." She further testified that Officer Blume told Mr. Menchaca that she would give him five minutes to remove his personal belongings from the car. Officer Blume allegedly also stated that she "already had it up to here," and "let him take the damn car. you've already lost it." Mrs. Menchaca went on to testify that as she left, Officer Blume told one of the repossessors,"We're leaving,and if he gives you any more trouble,call us and we'll come arrest him and take him in." In response to the question, "And

why is it your husband stopped objecting to the taking of this car?," Mrs. Menchaca replied: "Because she told us--told my husband she was going to arrest him if he didn't go ahead and let them take it--give them the keys."

Mr. Menchaca testified that after he began quarreling with the repossessors, one of them said to the other, "Why don't you go call the police?" He stated that the other man did so, and that Officer Blume and Palacios arrived within two or three minutes. According to Menchaca, Officer Blume asked, "Do you have a court order, I mean, just the paper, whatever, saying that you can repossess the car?" The repossessor showed her a paper, and she allegedly replied, "Then you have the right to take the car." Menchaca said that he replied, "I'll be goddamed if you're going to

take the car," and Blume responded: "Stop talking like that or we're going to have to take you in." It is undisputed that the repossessors had no court order. From this point, Tomas Menchaca's testimony echoed that of Irma Menchaca.

The Menchacas' original complaint named as Defendants Chrysler Credit Corporation, Officers Blume and Palacios, City of Laredo, Norman Clark, and Blazer Financial Services, Inc. It was averred that at all times Clark and Blazer acted as agents of Chrysler Credit Corporation. The complaint alleged that Chrysler attempted to seize the Menchacas' automobile in the manner described by their testimony:

On August 29,1977, at 1:00 o'clock P.M., Defendant Chrysler Credit Corporation arrived at the Plaintiffs' home and began to seize and repossess the automobile with the use of a tow-truck. The

Plaintiffs informed Defendant Chrysler Credit Corporation that they objected to such seizure. Defendant Chrysler Credit Corporation telephonically summoned two police officers from the City of Laredo and threatened that Defendant Chrysler Credit Coporation would arrest Plaintiffs and file charges and criminal actions against Plaintiffs when in fact Plaintiffs had not violated any criminal laws. Defendants Crhysler Credit Corporation deliberately and intentionally and in concert with Defendants Blume and Palacios intimidated and coerced Plaintiffs into relinquishing their property.

Defendants Blume and Palacios threatenedPlaintiffs with arrest charges, and criminal action for objecting and resisting the seizure of their property. Defendants Blume and Palacios used abusive, profane, and obscene language,

both in Spanish and English, against Plaintiffs to intimidate and coerce the Plaintiffs into relinquishing their property to the Defendants.

The City of Laredo filed a "Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief May be Granted." That is the form of dismissal motion contemplated by Rule 12(b)(6). Officer Blume answered, denying the allegations that she used profane language or threatened the Menchacas into relinquishing their property to the Defendants. Norman Clark and Blazer Financial Services moved to dismiss under Rule 12 (b)(6), and noticed that they would also move under Rule 12 (b)(1). Chrysler Credit Corporation moved to dismiss for lack of jurisdiction over the subject matter, obviously under 12 (b)(1). The testimony summarized above was taken at a hearing on October 5, 1977. On October 6, the Court entered

the following memorandum and order:

Mr. and Mrs. Tomas Menchaca were having altercation (sic) with a Mr. Kelly and another gentlemen (sic) who were sent to repossess a 1975 Chrysler Cordoba. During the altercation the other gentlemen who was with Mr. Kelly called the police. The police came on the scene to quiet a disturbance. Police Officer Blume, in fact,took a machete away from the possession of Mr. Menchaca and gave it to a neighbor to see that there was no violence. There is some dispute as to whether she gave them any advise. (sic) However, the Menchaca's (sic) had called their attorney and were going to rely on what the attorney told them and not what a female officer of the City of Laredo told them.

There existed no conspiracy between the officers of the police and the parties seeking to repossess the car. The Court

finds that the officers arrived at the scene to quiet a disturbance and had made no agreement prior to arriving there to try to repossess the automobile. When they left, the situation had been calmed down and the automobile was still there. The parties were still waiting for the attorney to arrive at the scene when the officers left.

This Court cannot find any State action in this situation which would invoke the jurisdiction of the Federal Court. Therefore, the case is dismissed as to all parties.

It is important to note that the Court weighed the evidence in reaching that conclusion. "There is some dispute . . ." The Court's gratuitous comment that the Menchacas would listen to their lawyer and not the commands of a police

officer threatening arrest is simply amazing. I can find nothing in the record to indicate that Mr. Menchaca threatened anyone with a machete.

II

The self-help repossession provision of the Uniform Commercial Code, adopted in Texas as Tex. Bus. Comm. Code Ann. Art. 9.503 (Vernon 1975) reads in pertinent part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed with action.

This provision has been interpreted in Texas to mean that a repossession must

be "peaceable", accomplished without force or violence. Ford Motor Credit Company v Cole, 503 S.W.2d 853 (Tex. Civ. App. Fort Worth 1973, writ dism'd). Clearly, it contemplates that if peaceable repossession cannot be had, the remedy of the would-be repossessor lies with the courts. See Hubbard v Lagow, 576 S.W.2d 163 (Tex. Civ. App.--Austin 1979, writ ref'd n.r. e.).

That the "state action' requisite for Sec. 1983 jurisdiction would be present, if the Menchacas should prevail on their assertions of police intervention and facilitation of a Sec. 9-503 repossession, cannot be doubted. By Sniadach v Family Finance Corp. 395 U.S. 337, 89 S.Ct.1820, 23 L.Ed.2d 349 (1969), and Fuentes v Shevin, 407 U.S.67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the Supreme Court has declared that the states may not contra-

vene the constitutional right to be heard by authorizing a seizure of property in the possession of one person upon the application of another without providing the opportunity for a hearing. The question naturally arose whether Sec.9-503 of the U. C.C., in providing for self-help repossession, by its very existence constituted the necessary state action ingredient to a suit for deprivation of procedural due process rights via Sec. 1983. It is now settled that a private repossession under the Code provision, alone, is not state action. Calderon v United Furniture Company, 505 F2d 950 (5 Cir.1974);Brantley v Union Bank and Trust Co., 498 F.2d 365 (5 Cir. 1974); James v Pinnix, 495 F.2d 206 (5 Cir.1974); See also Annot., Validity, Under Federal Federal Constitution and Laws, of Self-Help Repossession Provision of Sec. 9-503 of Uniform Commercial Code, 29ALR Fed.418

(1976).

Between these two points, recovery of property through procedures involving process issued under the authority of the state without hearing, and wholly private recovery under enabling legislation provided by the state, will fall a situation where the police directly facilitate a private recovery. Assuming, arguendo, that the Menchacas are correct, that is the situation before us. I am emphatically of the opinion that it crosses the line into the range of state action prohibited by Sec. 1983. Surely, if the process of a state may not issue for garnishment of wages or replevin of personal property without the opportunity of a hearing, then state officers may not with impunity bring about the same result. To hold that this sort of intervention does not constitute state action would be to

frustrate the purpose of Fuentes, Sniadach, and Sec.9-503 itself.

The Supreme Court made clear in United States v Price, 383 U.S. 787, 86 S. Ct. 1152, 16 L.Ed2d 267 (1966) that private persons acting jointly with state officials in a prohibited undertaking themselves act under color of law. We need not look for any "symbolic" relationship or other tenuous contention between Chrysler and the State,as has been attempted in other cases. See, e.g., James v Pinnix, supra; Adams v Southern Califor- First National Bank, 492 F2d 324 (9 Cir. 1973). If the Menchacas prevail as to the facts on trial, then the connection was immediate and critical.

Police officers have no business facilitating a repossession under the section. If the conduct alleged did in fact occur, the Laredo police depart-

ment would be wise to train its officers to intervene neutrally where necessary to prevent a breach of the peace, but certainly not to aid the self-help repossessor. For the reasons stated above, I believe action to the contrary is an outrage, and squarely within the ambit of Sec. 1983.

III

The District Court erred in summarily determining the facts of this case against the Menchacas on motion to dismiss under Rule 12, as the determination of facts necessary to pass judgment on the jurisdictional issue discussed above should have been postponed until trial. As I have detailed, one party moved for dismissal under Rule 12(b)(1), one so moved under 12(b)(6), and two proceeded under both. The majority wholly ignores the important procedural distinctions between these sections.

It is beyond dispute that under 12(b)(6) a district court may not indulge in considerationof a "factual" attack by affidavits and testimony upon the sufficiency of allegations concerning subject matter jurisdiction. "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief." 5 Wright and Miller, Federal Practice and Procedure, Sec. 1356 at p. 590 (1969). The District Court was required to take those allegations as true. Scheuer v Rhodes, 416 U.S. 232, 94 S. Ct.1683, 40 L.Ed.2d 90 (1974); Jenkins v McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L.Ed.2d 404 (1969); Johnson v Wells, 566 F2d 1016 (5 Cir. 1978); Mann v Adams Realty Co., 556 F.2d 288 (5 Cir. 1977). "It is axiomatic that a motion to dismiss an action for failure to state a claim upon which relief can be granted admits the facts alleged in the

complaint, but challenges plaintiff's right to relief based upon those facts." Ward v Hudnell, 366 F.2d 247, 249 (5 Cir. 1966). The allegations of the Menchacas are in my view clearly sufficient to confer subject matter jurisdiction under Sec. 1983. The majority, however, simply ignored the fact that at least one motion to dismiss was based entirely upon Rule 12(b)(6).

The other motions, under Rule 12(b)(1), would ordinarily open a Plaintiff's allegations to factual attack in a pre-trial hearing on subject matter jurisdiction. The District Court should be aware that after such an inquiry it may dismiss for lack of subject matter jurisdiction "only if the federal claims are 'wholly insubstantial or frivolous' ". Save Our Cemetaries v Archidiocese of New Orleans, 568 F.2d 1074 (1978),citing Baker v Carr,369 U.S.186,82 S.Ct. 691,

7L.Ed2d 663 (1962); Bell v Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L.Ed. 939 (1946). The controlling cases here,however, are those by this court and others noting that where the jurisdictional issue is factually intertwined with the merits, to a large extent, the court should postpone a decision until evidence is submitted at trial.

In McBeath v Inter-American Citizens For Decency Committee, 374 F.2d 359 (5 Cir. 1967), this court stated that a district court may determine the prerequisites of jurisdiction in advance of a trial on the merits. The court reversed a pretrial dismissal for lack of jurisdiction, however, holding that "where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide one with-

out the other." 374 F.2d at 363. It was noted that the Supreme Court, in Land v Dollar, 330 U.S. 731 67 S.Ct. 1009, 91 L. Ed. 1209 (1947), recognized that there are cases "where the question of jurisdiction is dependent on decision of the merits." 374 F.2d at 363. The policy behind this line of cases was discussed in Continental Casualty Company v Department of Highways, State of La., 379 F.2d 673 (5 Cir. 1967), wherein the District Courts were advised to be"mindful that when the issue of the jurisdictional amount is intertwined with the merits of the case, courts should be careful not to decide the merits, under the guise of determining jurisdiction, without the ordinary incidents of a trial." 379 F2d at 675.[1]

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1. Accord: Data Disc.,Inc.v Systems Tech. Assoc. Inc., 557 F.2d 1280 (9 Cir. 1977) ("Where the jurisdictional facts are intertwined with the merits, a decision on the jurisdictional issues is dependent on a decision of the merits. In such a case

The majority does not believe "the court abused its discretion to decide the merits of the jurisdictional issue. . ." I believe that it manifestly did so by summarily disposing of this case. The facts pertinent to decision on the merits are exactly those pertinent to a decision on jurisdiction. If the rationale of the cases quoted above is to have application anywhere, it should apply here. Thus, under either Rule 12(b)(1) or 12(b)(6), the District Court was precluded from

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the district court could determine its jurisdiction in a plenary pretrial proceeding. . . However, it is preferable that this determination be made at trial, where a plaintiff may present his case in a coherent, orderly fashion and without the risk of prejudicing his case on the merits." Id. at 1285,n.2); Zunamon v Brown, 418 F.2d 883 (8 Cir. 1969) (". . .in resolving the question of the appropriateness of jurisdiction as measured by the legal certainty of Plaintiff's claim, all doubts should be resolved by the district court in favor of allowing a plenary trial rather than

conducting the type of inquiry it did and from rendering final judgment on the motions to dismiss.[2] We enter dangerous territory when we sanction this sort of summary pre-trial disposition on jurisdictional grounds of cases involving vigorously disputed factual allegations, particularly where important constitutional rights are involved. It is quite possible that in such a rush to judgment the truth, that which our rules governing trial on the merits are designed to glean, will be lost.

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a peremptory 'trial' under the guise of an evidentiary jurisdictional hearing." Id. at 886); Jaconski v Avisun Corporation, 359 F.2d 931 (3 Cir. 1966) ("Except in the plainest cases the issue of jurisdictional amount should not be decided if the ruling constitutes at the same time a decision on the merits." Id at 935); Wade v Rogala, 270 F.2d 280 (3 Cir.1959) ("Indeed, since the issue of jurisdictional amount in this case is so closely tied to the merits of the cause, insistence upon evidence with respect thereto must be limited 'lest, under the guise of determining

I would not hold that the District Court erred by depriving Plaintiffs a jury trial in making its pre-trial ruling, but only that it should have waited until trial for the reasons stated above. I have outlined my reasons for concluding that if the Menchacas were to prevail on the facts, there would be jurisdiction. I would accord them the opportunity to try.

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jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury.' " Id. at 285); Fireman's Fund Insurance Company v Railway Express Agency , 253 F.2d 780 (6 Cir. 1958) ("Where the jurisdictional issue as to amount in controversy can not be decided without a ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure." Id. at 784).

2. Judge Ingraham, in his rejoinder to my dissent, summarizes my argument as being based on the fact that there were both 12(b)(1) and 12(b)(6) motions. That

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is not my point. My colleague is doubtless correct in holding that where there are motions to dismiss under both rules and a district court is able to pierce the pleadings under 12(b)(1) and find a lack of jurisdiction, the 12(b)(6) motion is obviated and where appropriate the entire suit may be dismissed. I have argued that in this case, in considering a motion to dismiss under either rule alone or both rules together, the District Court was required to determine the issues through trial by virtue of the case law construing each rule.

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

July 9, 1980

TO ALL PARTIES BELOW:

NO. 77-3186-TOMAS MENCHACA AND
WIFE IRMA MENCHACA V
CHRYSLER CREDIT CORP.,ET AL

DEAR COUNSEL:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate

Procedure for issuance and stay of mandate.

Very truly yours,

GILBERT F. GANUCHEAU, CLERK

by /s/ SALLY HAYWARD

Deputy Clerk

cc: Mr. J. G. Hornberger,Jr.
Mr.Horace C. Hall, III
Mr. George P. Kazen

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

TOMAS MENCHACA AND WIFE, IRMA MENCHA ()

VS () CIVIL ACTION NO.

CHRYSLER CREDIT CORPORATION BLASA BLUME, J. MARTINEZ, CITY OF LAREDO, NORMAN CLARK AND BLAZER FINANCIAL SERVICES, INC. () L-77-49

MEMORANDUM AND ORDER

(FILED OCTOBER 6, 1977)

Mr. and Mrs. Menchaca were having altercation with a Mr. Kelly and another gentlemen who were sent to repossess a 1975 Chrysler Cordoba. During the altercation the other gentlemen who was with Mr. Kelly called the police. The police came on the scene to quiet a disturbance. Police Officer Blume, in fact, took a machete away from the possession of Mr. Menchaca and gave it to a neighbor to see that there was no violence. There

is some dispute as to whether she gave them any advise. However, the Menchacas' had called their attorney and were going to rely on what their attorney told them and not what a female police officer of the City of Laredo told them.

There existed no conspiracy between the officers of the police and the parties seeking to repossess the car. The Court finds that the officers arrived at the scene to quiet a disturbance and had made no agreement prior to arriving there to try to repossess the automobile. When they left, the situation had been calmed down and the automobile was still there. The parties were still waiting for the attorney to arrive at the scene when the officers left.

This Court cannot find any State action in this situation which would invoke the jurisdiction of the Federal

Court. Therefore, the case is dismissed as to all parties.

Signed at Laredo, Texas, this 6th day of October, 1977.

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

TOMAS MENCHACA AND WIFE, IRMA MENCHACA ()

VS () CIVIL ACTION L-77-49

CHRYSLER CREDIT CORPORATION, BLASA BLUME, J. MARTINEZ, CITY OF LAREDO, NORMAN CLARK AND BLAZER FINANCIAL SERVICES, INC. ()

JUDGEMENT

Pursuant to the Memorandum and Order of even date, the above-mentioned cause is dismissed with prejudice.

Signed this 6th day of October, 1977.

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT
JUDGE

RULE 12

DEFENSES AND OBJECTIONS--WHEN AND HOW PRESENTED--BY PLEADING OR MOTION--MOTION FOR JUDGMENT ON THE PLEADINGS.

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the Court, within 20 days after service of the order, unless the order otherwise directs.

The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods to time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-

claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the

trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be

treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before imposing his responsive pleading.

The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permited by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under

this rule nor included in a responsive pleading or an amdnement thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

TOMAS MENCHACA and wife, IRMA MENCHACA ()

VS () CIVIL ACTION NO. L-77-49

CHRYSLER CREDIT CORPORATION, BLASA BLUME, J. MARTINEZ, CITY OF LAREDO, NORMAN CLARK AND BLAZER FINANCIAL SERVICES, INC.

Filed: 8/31/77

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE THE SAID COURT:

Tomas Menchaca and wife, Irma Menchaca, Plaintiffs, complaining of Chrysler Credit Corporation, Blasa Blume, J. Martinez, City of Laredo, Norman Clark and Blazer Financial Services, Inc., Defendants, respectfully alleges:

I

A. Plaintiff Tomas Menchaca is a citizen of the State of Texas and a resident of Webb County, Texas. Plaintiff Irma Menchaca is a citizen of the Republic

of Mexico, but is presently residing in Webb County, Texas.

B. Defendant Chrysler Credit Corporation is a Delaware Corporation doing business in Texas and Webb County Texas. Its registered agent for service of process is C.T. Corporation Systems, Republic National Bank Bldg., Dallas, Texas.

C. Defendants Blasa Blume and J. Martinez are citizens of the State of Texas and residents of Webb County, Texas. Such Defendants are police officers employed by the City of Laredo, Texas. At all times pertinent hereto, Defendants Blume and Martinez were acting within the scope and duties of police officers of the City of Laredo.

D. Defendant City of Laredo is a municipal corporation and political sub-division of the State of Texas organized

and existing under the laws of the State of Texas. Service of process may be had by serving the Mayor of the City of Laredo, Texas.

E. Defendant Norman Clark is a citizen of Texas and a resident of Webb County, Texas.

F. Defendant Blazer Financial Services, Inc. is a Texas Corporation doing business in Texas and Webb County, Texas. Its registered agent for service of process is C. T. Corporation Systems, Republic National Bank Building, Dallas, Texas.

G. At all times pertinent hereto, Defendants Clark and Blazer Financial Services, Inc. were acting as the authorized agent of Defendant Chrysler Credit Corporation.

II

Jurisdiction is invoked pursuant

to 42 USC Sec. 1983, 42 USC Sec. 1988, 28 USC Sec. 1331 and 28 USC Sec. 1332. The amount in controversy exceeds $10,000.00.

III

Defendants have acted in concert with one another and under color of law of the State of Texas have caused and permitted Plaintiffs to be deprived of rights, privileges, and immunities secured by the Fourteenth Amendment to the U. S. Constitution.

IV

1. In 1974 Plaintiffs contracted with Defendant Chrysler Credit Corporation in financing of a 1975 Chrysler automobile which Plaintiffs were purchasing. The contract called for monthly installments of approximately $175.00. As of August 1977 all monthly payments to Defendant Chrysler Credit Corporation

have been made with the exception of two.

2. On November 11, 1976, Plaintiff Tomas Menchaca was employed as an oil field worker. On November 11, 1976, Plaintiff Tomas Menchaca suffered a severe back injury in a work-related accident. The injury has prevented him from working since the date of the accident. He has been receiving weekly compensation of Seventy-seven Dollars ($77.00) pursuant to the workmen's compensation statutes of Texas.

3. Plaintiff Irma Menchaca is employed and earns Ninety-six Dollars ($96.00) per week. The Plaintiffs have four children.

4. On August 25, 1977, Defendant Clark proceeded to the home of Plaintiffs and informed Plaintiffs that he and Blazer Financial Services, Inc. were the authorized representatives of Chrysler

Credit Corporation. Defendant Clark informed the Plaintiffs that they were two payments in arrears on the contract with Defendant Chrysler Credit Corporation. Plaintiffs informed Clark that a payment would be sent to Defendant Chrysler Credit Corporation on August 29, 1977 which was the day Plaintiffs expected to receive their weekly compensation payment of $77.00. Defendant Clark informed Plaintiffs to bring the payment to his office on August 29, 1977. Defendant Clark threatened that if such payment was not forthcoming, seizure of the automobile would result even though no court proceedings had been instituted for the recovery of the vehicle. Plaintiffs informed Defendant Clark that they objected to any seizure of the automobile.

5. On August 29, 1977, at 1:00

o'clock P.M., Defendant Chrysler Credit Corporation arrived at the Plaintiffs home and began to seize and repossess the automobile with the use of a tow-truck. The Plaintiffs informed Defendant Chrysler Credit Corporation that they objected to such seizure. Defendant Chrysler Credit Corporation telephonically summoned two police officers from the City of Laredo and threatened that Defendant Chrysler Credit Corporation would arrest Plaintiffs and file charges and criminal actions against Plaintiffs when in fact Plaintiffs had not violated any criminal laws. Defendants Chrysler Credit Corporation deliberately and intentionally and in concert with Defendants Blume and Palacios, intimidated and coerced Plaintiffs into relinquishing their property.

6. Defendants Blume and Palacios

threatened Plaintiffs with arrest charges, and criminal action for objecting and resisting the seizure of their property. Defendants Blume and Palacios used abusive, profane, and obscene language, both in Spanish and English, against the Plaintiffs to intimidate and coerce the Plaintiffs into relinquishing their property to the Defendants.

7. Defendant Chrysler Credit Corporation removed the automobile to a location still unknown to the Plaintiffs.

V

Plaintiffs were never given judicial notice and hearing of any claim which Defendant Chrysler Credit Corporation might have against Plaintiffs as required by law.

VI

In addition to the above described acts, the City of Laredo violated the

rights of Plaintiffs guaranteed by the U. S. Constitution and the laws of the State of Texas in the following respects.

1. Failing to train and properly train its police officers.

2. Failing to teach fundamental principles of law to its police officers.

3. Instructing its police officers to assist in the repossession of automobiles.

4. Failing to instruct its police officers that they are not supposed to assist in the repossession of automobiles.

5. Failing to instruct its police officers that private property cannot be repossessed prior to notice and hearing being given to the holder of the property.

VII

The acts of the Defendants violated Plaintiffs' rights to due process of law

secured by the Fourteenth Amendment to the U. S. Constitution. The acts commited by Defendants were designed to intentionally inflict emotional distress upon the Plaintiffs.

VIII

The plaintiffs have suffered embarrassment, humiliation, and emotional distress as a proximate result of the acts of the Defendants. They have lost the only automobile they own. Plaintiff Irma Menchaca needs the automobile for traveling to and from work. Both Plaintiffs need the auto for themselves and their children. As a direct result of Defendants acts, Plaintiffs have suffered compensatory damages in the sum of Fifty Thousand Dollars ($50,000.00). As a direct of the intentional and deliberate acts of the Defendants, Plaintiffs seek punitive damages in the sum of

Fifty Thousand Dollars ($50,000.00).

IX

Plaintiffs have no adequate remedy at law to recover their automobile is not immediately returned to them. Plaintiffs seek a temporary restraining order instructing the Defendant to return the automobile to the Plaintiffs.

WHEREFORE, Plaintiffs pray for judgment in the following respects:

1. Compensatory damages in the sum of Fifty Thousand and No/100 Dollars ($50,000.00)

2. Punitive damages in the sum of Fifty Thousand and No/100 Dollars ($50,000.00)

3. A temporary restraining order instructing the Defendants to immediately return the 1975 Chrysler automobile to the Plaintiffs.

4. An injunction prohibiting the

Defendants from repossessing the automobile without proper notice and hearing as required by law.

J. G. HORNBERGER
J. G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Plaintiffs

by /s/ J. G. Hornberger, Jr.
J. G. HORNBERGER, JR.

Plaintiffs demand a jury.

The State of Texas ()
County of Webb ()

Before me, the undersigned authority on this day personally appeared Tomas Menchaca and Irma Menchaca, who after being duly sworn on their oath, deposed and said:

"Our names are Tomas Menchaca and Irma Menchaca. We are the Plaintiffs in the above entitled and numbered cause. We have read the Original Complaint and the statements contained therein are true."

/s/ Tomas Menchaca
Tomas Menchaca
/s/ Irma Menchaca
Irma Menchaca

Sworn to and subscribed before me by the said Tomas Menchaca and Irma Menchaca this 31st day of August,1977.
/s/ Rosa S. J. Mata
Notary Public,Webb County,Texas.

Supreme Court, U.S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-319

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THOMAS MENCHACA AND WIFE, IRMA MENCHACA,
Petitioners,

vs.

CHRYSLER CREDIT CORPORATION,
BLASA BLUME, J. MARTINEZ,
CITY OF LAREDO, NORMAN CLARK,
AND BLAZER FINANCIAL SERVICES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

Attorney of Record:

RICHARD N. HANSEN
MANN, FREED, HANSEN & TREVIÑO
P.O. Box 820
Laredo, Texas 78040
(512) 723-5581
Attorneys for Chrysler Credit Corporation

HORACE C. HALL, III
HALL & SAMES
P.O. Box 207
Laredo, Texas 78040
(512) 723-5527
Attorneys for the City of Laredo

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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The Respondents, Chrysler Credit Corporation, Blasa Blume, J. Martinez, City of Laredo, Norman Clark and Blazer Financial Services, Inc., pray that a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES III

REASON FOR DENYING THE WRIT 1

I. THERE IS NO CONFLICT BETWEEN THE CASES CITED BY PETITIONERS AND THE DECISIONS OF THE TRIAL COURT AND COURT OF APPEALS IN THIS CASE 1

II. THE PROCEDURAL POSTURE OF THIS CASE REQUIRED THE TRIAL COURT TO DETERMINE ITS JURISDICTION TO ACT PRIOR TO PROCEEDING TO TRIAL ON THE MERITS 4

III. RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT UNCONSTITUTIONAL FOR ALLOWING A TRIAL JUDGE TO DISPOSE OF THE JURISDICTIONAL ISSUE WITHOUT A JURY 5

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. Kress & Co.,
398 U.S. 144 (1970) 3

Conley v. Gibson,
355 U.S. 41 (1957) 6

Gibbs v. Buck,
307 U.S. 66 (1939) 4

Gilbert v. David,
235 U.S. 561 (1915) 3

Land v. Dollar,
330 U.S. 731 (1947) 1

McLain v. Real Estate Board,
444 U.S. 232 (1980) 6

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 2

Wetmore v. Rymer,
169 U.S. 115 (1898) 3

American Federation of Musicians v. Bonatz,
475 F.2d 433 (3rd Cir. 1973) 3

Berandinelli v. Castle & Cooke, Inc.,
587 F.2d 37 (9th Cir. 1978) 1

Data Disc, Inc. v. Systems Technology Assoc. Inc.,
557 F.2d 1280 (9th Cir. 1977) 3

Fireman's Fund Ins. Co. v. Railway Express Agency,
253 F.2d 780 (6th Cir. 1958) 2

Gough v. Rossmore Corp.,
487 F.2d 373 (9th Cir. 1973) 3

Industrial Electronics Corp. v. Cline,
330 F.2d 480 (3rd Cir. 1964) 4

International Video Corp. v. Ampex Corp.,
484 F.2d 634 (9th Cir. 1973) 6

McBeath v. Inter-American Citizens for Decency Comm., 475 F.2d 433 (3rd Cir. 1973) 3

Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel, Co., 469 F.2d 416 (5th Cir. 1972) 6

Sunray DX Oil Co. v. FPC,
351 F.2d 395 (10th Cir. 1965) 1

Thornhill Publishing Co. v. General Telephone & Electronics Corp., 594 F.2d 730 (9th Cir. 1979) 4

Wade v. Rogalia,
270 F.2d 280 (3rd Cir. 1959) 1

Zunamon v. Brown,
418 F.2d 883 (8th Cir. 1969) 1, 2

Federal Rules:

Fed. Rule, Civ. Proc. Rule 12(d), (h) 5, 6

Other Authorities:

5 Moore's Federal Practice §38.36 (2.-2) p. 300 (1979) 5

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE CASES CITED BY PETITIONERS AND THE DECISIONS OF THE TRIAL COURT AND COURT OF APPEALS IN THIS CASE.

In *Berandinelli v. Castle and Cooke, Inc.*, 587 F.2d 37 (9th Cir. 1978), cited by Petitioners as in conflict with this case, the court simply cited the general rule that where a genuine issue of fact exists which would determine the court's jurisdiction to act as well as determine the merits of the cause of action, the court has jurisdiction to determine its jurisdiction in a trial on the merits. *Land v. Dollar,* 330 U.S. 731, 67 S. Ct. 1009, 91 L.Ed. 1209 (1947). In *Berandinelli,* the issues concerning the court's jurisdiction and those on the merits differed, and the court disposed of the case on a plea to the jurisdiction. That case is simply not in point. In *Sunray DX Oil Co. v. F.P.C.,* 351 F.2d 395 (10th Cir. 1965) the court recited the same general rule. However in *Sunray,* the Court of Appeals was forced to determine the jurisdictional issue, and did so by an examination of the facts and circumstances of the case. There was no demand for a jury in that case, and no constitutional issues were raised.

The final three cases cited by Petitioners all concern the determination of whether the requisite jurisdictional amount of damages exist in a given case. *Zunamon v. Brown,* 418 F.2d 883 (8th Cir. 1969); *Wade v. Rogalia,* 270 F.2d p. 280

(3rd Cir. 1959); *Fireman's Fund Insruance Co. v. Railway Express Agency,* 253 F.2d 780 (6th Cir. 1958). Cases involving the jurisdictional amount question fall into a separate category since in any case where unliquidated damages are involved, the amount of damages is a pure question of fact. Even then, however, each of these cases points out that the mode of determining jurisdiction is left to the discretion of the trial court. The court may receive testimony and weigh affidavits, and it if appears to the court "to a legal certainty" that the court has no jurisdiction the case should be dismissed. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 58 S. Ct. 586, 82 L.Ed. 845 (1938). As the court stated in *Zunamon, supra,* 418 F.2d at 886, the scope of the pretrial jurisdictional inquiry depends upon the pleadings and facts in each particular case.

This action was a civil rights action for wrongful repossession of a vehicle. Petitioners alleged that agents for defendant Chrysler Credit Corporation acted in concert with two City of Laredo police officers to wrongfully reposess their automobile. It is undisputed that the police were called to the scene of the repossession to quell a disturbance, and that they left the scene prior to the time the car was taken away after satisfying themselves that there would be no more public disturbance. The police officers were simply doing their job, and it the repossession which was completed after they left the scene was wrongful, the petitioners could have had their remedy in state court.

This is essentially what the trial court found after considering all of the evidence after a plenary hearing on the issue of jurisdiction; and that this set of facts did not consitute state action. There was absolutely no evidence of any conspiracy or agreement between the police officers and the other defendants. In such a case the trial court was justified in

finding that as a matter of law there was no state action sufficient to invoke the court's jurisdiction. The Petitioners were given every opportunity to establish jurisdiction in the district court, and were unable to do so. In this sense, this case differs from such cases as *American Federation of Musicians v. Bonatz,* 475 F.2d 433 (3rd Cir. 1973) and *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359 (5th Cir. 1976) in which the trial courts were reversed for failing to give the Plaintiffs an adequate opportunity to prove up jurisdiction. After a full hearing on the question, the judge had the authority to dismiss the complaint. *See Data Disc, Inc. v. Systems Technology Associates, Inc.,* 557 F.2d 1280 (9th Cir. 1977).

> It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so; the parties having adduced their testimony, pro and con, it was the privilege of the court to dispose of the issue upon the testimony which was fully heard upon that subject. *Gilbert v. David,* 235 U.S. 561, 35 S. Ct. 164, 59 L.Ed. 360 (1915); *Wetmore v. Rymer,* 169 U.S. 115, 18 S. Ct. 293, 42 L.Ed. 682 (1898)

Finally, it is clear that in this case the decision on the jurisdictional issues was not "completely intermeshed" with the merits of the claim. *See Gough v. Rossmore Corp.,* 487 F.2d 373 (9th Cir. 1973). The trial court found that the police officers' appearance at the scene was not sufficient to constitute state action. *See Adickes v. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed. 2d 142 (1970). If the repossession was wrongful, as alleged, the Plaintiffs still had their remedy in state court on the merits. Thus a decision against them on the jurisdictional issue in federal court, did not constitute a decision on the merits but merely forced the

Plaintiff to seek redress in state court. The trial court acted within its authority in dismissing the action. *See Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).

II.

THE PROCEDURAL POSTURE OF THIS CASE REQUIRED THE TRIAL COURT TO DETERMINE ITS JURISDICTION TO ACT PRIOR TO PROCEEDING TO TRIAL ON THE MERITS.

This case was dismissed after a hearing held upon Plaintiff's application for a temporary injunction. In response to Plaintiff's request for an injunction, Defendants filed, among other motions, a motion to dismiss for want of jurisdiction, which placed the burden upon Plaintiffs to prove jurisdiction. *Gibbs v. Buck,* 307 U.S. 66, 59 S. Ct. 725, 83 L.Ed. 1111 (1939). "Where the challenge is interposed on an application for a preliminary injunction, the Plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate success on the question of jurisdiction when the action is tried on the merits." *Industrial Electronics Corp. v. Cline,* 330 F.2d 480 (3rd Cir. 1964). If the Plaintiff, as in this case, fails to set up such facts by a preponderance of the evidence as would give the court jurisdiction, he has not only failed to meet the standard required for the court to grant extraordinary relief, but has also established that the case should be dismissed. The court should not be put the task of determining the issue in a full pre-trial hearing, and then rehearing the evidence before a jury on the chance that they

might interpret the facts differently. This is particularly true when the jurisdictional issue concerns statutory coverage of a given set of facts, such as "state action", where the facts are not materially in dispute.

> As a matter of policy, however, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation. The difference is this: If coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which underlying facts are not in dispute but different inferences may be drawn from them. Thus on the same business arrangements one case may be decided one way and another in a different way, as the jury may find that the arrangements did or did not affect commerce, or in the case of the Jones Act one employee may recover as a seaman while another with the same duties may not. Surely these are matters that should be treated as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. 5 Moore's Federal Practice §38.36 (2.-2), p. 300 (1979).

III.

RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT UNCONSTITUTIONAL FOR ALLOWING A TRIAL JUDGE TO DISPOSE OF THE JURISDICTIONAL ISSUE WITHOUT A JURY.

Federal Rule of Civil Procedure 12(d) provides, in pertinent part, "the defenses specifically enumerated (1)-(7) in subdivision (b) of the Rule, whether made in pleading or by motion . . . shall be heard and determined before trial

on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." Rule 12(h)(3) provides, "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is fundamental that a court must have jurisdiction over the subject matter of the controversy before it may act, and the court's duty to dismiss a complaint is not a discretionary matter where it appears that the court lacks jurisdiction. *See International Video Corp. v. Ampex Corp.,* 484 F.2d 634 (9th Cir. 1973). Although a complaint should not be dismissed unless "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed. 80 (1957); *see McLain v. Real Estate Board,* 444 U.S. 232, 100 S. Ct. 502, 62 L.Ed. 441 (1980), if the Plaintiff is afforded every opportunity at a plenary pre-trial hearing to establish jurisdiction and cannot do so, then the complaint should be dismissed. This is not deprival of a jury trial, but a determination as a matter of law that jurisdiction does not exist. *See Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.,* 469 F.2d 416 (5th Cir. 1972).

CONCLUSION

For the reasons stated, the Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

RICHARD N. HASEN
MANN, FREED, HANSEN & TREVIÑO
P.O. Box 820
Laredo, Texas 78040
(512) 723-5581

Attorneys for Chrysler Credit Corporation

HORACE C. HALL, III
HALL & SAMES
P.O. Box 207
Laredo, Texas 78040
(512) 723-5527

Attorneys for the City of Laredo

CERTIFICATE OF DELIVERY

I Richard N. Hansen certify that on this the _____ day of October, 1980, a true and correct copy of the attached Response to Petition for Certiorari was Mailed Parcel Post to: Jacob G. Hornberger, Jr., Attorney for petitioiner at 915 Victoria Street, Laredo, Texas 78040.

_____

Attorney for Respondent.